Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-759

HON. EDWIN EDWARDS, *et al.*,

Appellants,

—v.—

MARSHA B. HEALY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

RUTH BADER GINSBURG
MELVIN L. WULF
BRENDA FEIGEN FASTEAU
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

GEORGE M. STRICKLER, JR.
344 Camp Street
Suite 1100
New Orleans, Louisiana 70130

Attorneys for Appellees

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Pursuant to Rule 16 of the Rules of this Court, appellees move to affirm the judgment of the district court.

Statement

This is a direct appeal from a judgment of a three-judge district court "declaring the Louisiana Jury Selection System whereby women may not serve on juries without filing a written declaration of their desire to do so unconstitutional" and enjoining defendants "from enforcing the constitutional and statutory provisions declared to be unconstitutional." Amended Judgment, September 7, 1973, re-

produced in the Appendix to the Jurisdictional Statement at 28.

On June 25, 1973, preliminary to a pre-trial conference, the parties entered into a stipulation of facts.[1] A copy of this stipulation is attached hereto as Appendix A. On the basis of the stipulation, and without objection by defendants, the court declared by pre-trial order entered June 25, 1973:

> Issues of Fact
>
> There are no contested issues of fact. The parties have entered into a stipulation of facts for submission to the Court.

The stipulation recites that "[f]ifty-three percent (53%) of the population of persons eligible for jury service in St. Tammany Parish and Washington Parish [the two parishes in which plaintiffs in this litigation reside] is female," that in St. Tammany Parish "no more than ten percent (10%) of the persons in the general venire or jury wheel are female," and that in Washington Parish, to the knowledge of the Clerk of Court, "no more than two women . . . have [ever] requested that they be made eligible for jury service" and "only on one occasion has a woman been included in a petit jury venire." Further, the stipulation includes a list of fourteen jury drawings made in St. Tammany Parish in recent years. In five of the drawings, no

[1] The representation in the Jurisdictional Statement at 5 that "[t]he only reference to the alleged facts of the case is contained in the complaint" is thus wholly erroneous. The stipulation provided the facts that constituted the basis for adjudication. "No testimony was adduced," because the court found, and the parties agreed, that there were no contested issues of fact.

women were drawn, in two, women represented .05% of the names drawn, in four, 1%, in two, 2%, and in one, where the representation of women was highest, 4%.

Also stipulated were the facts that plaintiff-intervenor Jenny Lee Smith Baggett "has filed a civil damage action . . . in Washington Parish and has requested a jury trial" and that plaintiff-intervenor Shirley Ann Robinson "is preparing to file a civil damage action in St. Tammany Parish [and] will request a jury trial."

ARGUMENT

In *Hoyt* v. *Florida*, 368 U.S. 57 (1961), this Court upheld the constitutionality of a Florida statute almost identical to the Louisiana provisions declared unconstitutional by the court below. On the basis of the stipulation of facts, demonstrating that under the Louisiana Jury Selection System, service by women is virtually non-existent, and following the direction implicit in this Court's decisions in *Reed* v. *Reed*, 404 U.S. 71 (1971), *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), *Peters* v. *Kiff*, 407 U.S. 493 (1972), and *Carter* v. *Jury Commission*, 396 U.S. 320 (1970), the district court concluded that *Hoyt's* death knell has been sounded.

Hoyt represents the last occasion when this Court tolerated a legislative judgment based on gross generalizations concerning woman's place in man's world. See Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L.Rev. 675, 718-21 (1971). ("At best, [*Hoyt*] overlooks the obvious fact that statutes exempting women from jury service do reflect the historical male prejudice against female participation

in activities outside the family circle.") Until *Reed* and *Frontiero, Hoyt* inspired extravagant description of the frivolity of women, *see, e.g., DeKosenko* v. *Brandt,* 63 Misc. 2d 895, 898, 313 N.Y.S.2d 827, 830 (Sup. Ct. N.Y. Co. 1970), and impeded recognition throughout the nation that jury service is at the same time a basic civil right and fundamental civic responsibility, to be shared equally by all adult members of the community.[2] Indeed, as illustrated by the decisions cited in Appendix B attached to this Motion and in the Jurisdictional Statement at 6, *Hoyt* continues to produce occasional knee-jerk responses from lower courts, both federal and state.

Appellees concur in Appellants' assertion that "the guiding hand of this Court is urgently needed." Jurisdictional Statement at 6. However, the decisional guidelines have been articulated in *Reed* and *Frontiero.* Explicit overruling of *Hoyt* is therefore appropriately accomplished without protracting this litigation and unnecessarily burdening this Court's docket.

[2] By 1970, however, Louisiana was the only state to retain "volunteers only" legislation on jury service by women; the majority of states treated women and men on the same basis. Library of Congress Legislative Reference Service, American Law Division, June 10, 1970 report to the Senate, in Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 725-27 (1970).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

RUTH BADER GINSBURG
MELVIN L. WULF
BRENDA FEIGEN FASTEAU
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

GEORGE M. STRICKLER, JR.
344 Camp Street
Suite 1100
New Orleans, Louisiana 70130

Attorneys for Appellees

December, 1973

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 73-688

Section "C"

MARSHA B. HEALY, *et al.*,

Plaintiffs,

versus

HON. EDWIN EDWARDS, *et al.*,

Defendants.

Stipulation of Facts

Plaintiffs, plaintiffs-intervenors, and all defendants in the above cause, through their respective counsel, do hereby stipulate and agree, subject to objection by any party as to relevance, competency and materiality, as follows:

1) The Jury Commissions of St. Tammany Parish and Washington Parish, whose members are defendants herein, comply with all provisions of Article 402 of the Louisiana Code of Criminal Procedure, Louisiana Revised Statutes, Title 13, Article 3055 and Article 7, Section 41 of the Louisiana Constitution of 1921. Female residents of St. Tammany and Washington Parishes who are eligible for jury service under the standards of Article 401 of the

Louisiana Code of Criminal Procedure are not included in the general venires or jury wheels of the parishes unless they individually make written requests to their respective Jury Commissions to be so included.

2) Each of the female plaintiffs and female plaintiffs-intervenors is eligible for jury service under the standards of Article 401 of the Louisiana Code of Criminal Procedure and Louisiana Revised Statutes, Title 13, Section 3041. None have filed requests to be placed in the general venires of their respective parishes and none have been so included.

3) Plaintiff-intervenor Baggett has filed a civil damage action in the Twenty-Second Judicial District Court in Washington Parish and has requested a jury trial. Plaintiff-intervenor Robinson is preparing to file a civil damage action in St. Tammany Parish. She will request a jury trial.

4) Each of the male plaintiffs is eligible for jury service under the standards of Article 401 of the Louisiana Code of Criminal Procedure and Louisiana Revised Statutes, Title 13, Section 3041.

5) Fifty-three percent (53%) of the population of persons eligible for jury service in St. Tammany Parish and in Washington Parish is female.

6) In St. Tammany Parish no more than ten percent (10%) of the persons in the general venire or jury wheel are female. In recent years the following jury drawings have been made:

November 22, 1971. Fifty (50) names for Grand Jury to serve first six months of 1972. Two (2) women drawn.

December 8, 1971. Two Hundred (200) names for jury term beginning January 10, 1972. One (1) woman drawn.

January 7, 1972. Two hundred (200) names for jury term beginning March 13, 1972. No women drawn.

February 28, 1972. One hundred (100) names for jury term beginning April 3, 1972. Two (2) women drawn.

February 28, 1972. Two hundred (200) names for jury term beginning April 13, 1972. One (1) woman drawn.

March 17, 1972. Two hundred (200) names for jury term of May 8, 1972. Two (2) women drawn.

April 11, 1972. Seventy-five (75) names for jury term of April 13, 1972. No women drawn.

May 22, 1972. One hundred-fifty (150) names for jury term of July 10, 1972. No women drawn.

June 15, 1972. Fifty (50) names for Grand Jury term for next six months. No women drawn.

July 26, 1972. Two hundred (200) names for jury term of September 11, 1972. Two (2) women drawn.

August 25, 1972. Two hundred (200) names for term of October 9, 1972. Two (2) women drawn.

September 28, 1972. Two hundred (200) names for jury term of November 13, 1972. Two (2) women drawn.

November 3, 1972. Seventy-five (75) names for jury term of December 18, 1972. No women drawn.

December 4, 1972. Fifty (50) names for Grand Jury term of next six months. One (1) woman drawn.

7) If called to testify, Dewaine Seal, the Clerk of Court of Washington Parish, would testify that to his knowledge, no more than two women in Washington Parish have requested that they be made eligible for jury service and that only on one occasion has a woman been included in a petit jury venire.

8) The discrepancies between the percentages of women in the populations of persons eligible for jury service in St. Tammany and Washington Parishes and the percentages of women actually included in the venires of those parishes is the result of the enforcement of Article 402 of the Louisiana Code of Criminal Procedure, Louisiana Revised Statutes, Title 13, Article 3055, and Article 7, Section 41 of the Louisiana Constitution of 1921.

GEORGE M. STRICKLER, JR.
Counsel for Plaintiffs and Plaintiffs-Intervenors

DALE C. WILKS
Counsel for Defendants

Dated: June 25, 1973

APPENDIX B

Hoyt-Inspired Judicial Tolerance of Sex-Role Stereotyping

All litigants are denied due process of law, and female litigants are additionally denied the equal protection of the laws by a jury service exemption for women "different from that available for men under substantially similar circumstances, and on the basis of a sexual criterion that is wholly unrelated to the objectives of jury service." So concluded the court below, despite the contrary precedent of this Court in *Hoyt* v. *Florida*, 368 U.S. 57 (1961).

Hoyt was the last of a series of decisions in which this Court exhibited extraordinary tolerance of gender lines drawn by the legislature.* A new direction was plainly marked in *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). With respect to jury service as a responsibility entrusted primarily to males, additional signposts of a change in judicial perspective appear in *Peters* v. *Kiff*, 407 U.S. 493, at 503-504 and n. 12 (1972), and *Alexander* v. *Louisiana*, 405 U.S. 625, 639-41 (1972) (concurring opinion). Reasoning that only the formal burial of *Hoyt* was awaited, the court below explained:

> When today's vibrant principle [which determined the outcome in *Reed* and *Frontiero*] is obviously in conflict with yesterday's sterile precedent, trial courts need not follow the outgrown dogma. Hence we consider that *Hoyt* is no longer binding.

Other courts, both federal and state, have not perceived with similar clarity this Court's departure from the atti-

* Similar deference to legislative line drawing on the basis of sex was displayed thirteen years earlier in *Goesaert* v. *Cleary*, 335 U.S. 464 (1948).

tude reflected in *Hoyt*. Indeed, in 1973, the Louisiana Supreme Court concluded:

> There has been no contrary jurisprudence from the United States Supreme Court since the *Hoyt* case, although that Court has had the opportunity to overrule the case . . . .

(*State* v. *Enloe*, —— La. ——, 276 So. 2d 282, 284 (1973)) and a federal district court uncritically asserted on the basis of *Hoyt*, " . . . it is well settled that a state may allow women unconditional exemption from jury service." *Penn* v. *Eubanks*, 360 F. Supp. 699, at 703 (M.D. Ala. 1973). Nor are these expressions atypical. As the sampling below indicates, *Hoyt* contributes to perpetuation of conditions for lay participation in the administration of justice that are less than optimal, to persistence of the notion that exemption of women from adult responsibilities is a "benign dispensation," and to adherence to "outgrown dogma" that law-sanctioned restrictions premised on gender are presumptively valid. In short, unless and until this Court squarely overrules *Hoyt* and rejects the reasoning on which it is based, the quality of the *Reed-Frontiero* principle is likely to remain subject to divergent interpretation, "vibrant" to some jurists, of scant importance, signifying minimal change, to others.

[In the sampling below, the second page reference is to the portion of the opinion at which *Hoyt* is cited.]

> "It is manifestly unfair to indulge in generalities when speaking of women, which no one would think of using when referring to men." [1]

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[1] Cottle, The Prejudice Against Women Lawyers: How Can it be Overcome? 21 Case & Com. 371 (1914).

Garner v. *Louisiana*, 368 U.S. 157, 195 (1961) (concurring opinion) (judiciary may take notice of well-known political and economic facts—in *Hoyt*, that woman is "the center of home and family life"). [In 1972, 60% of all married women living with their husbands were gainfully employed, and 42% of all working women were employed full-time the year round. U.S. Women's Bureau, Dept. of Labor, Highlights of Women's Employment and Education (1973).]

Eslinger v. *Thomas*, 476 F.2d 225, 230 n.5 (4th Cir. 1973) (*Hoyt* signalled that arguments based on sex-discrimination would have scant chance of success).

Robinson v. *Board of Regents of Eastern Kentucky University*, 475 F.2d 707, 710 (6th Cir. 1973) (sex-based classifications are presumptively constitutional).

United States v. *Olson*, 473 F.2d 686, 687 (8th Cir.), *cert. denied*, 412 U.S. 905 (1973) (whether Constitution prohibits exclusion of women from juries remains an open question).

Schattman v. *Texas Employment Commission*, 459 F.2d 32, 40 (5th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973) (lump classification of women is permissible unless challenger proves it "arbitrary").

Baker v. *United States*, 401 F.2d 958, 964 n.14 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970) (jury service).

United States v. *Caci*, 401 F.2d 664, 671 (2d Cir. 1968), *cert. denied*, 394 U.S. 917 (1969) (jury service).

Gruenwald v. *Gardner*, 390 F.2d 591, 592 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968) ("favored" treatment

may be accorded women solely on the basis of their sex).

Marshall v. *Holmes*, 42 U.S.L.W. 2206 (N.D. Fla. 1973) (jury service—*Hoyt* as precedent remains unscarred).

Eslinger v. *Thomas*, 340 F. Supp. 886, 896 n. 77 (D.S.C. 1972), *rev'd*, 476 F. 2d 225 (4th Cir. 1973) (sex discrimination has been held constitutionally tolerable).

Forbush v. *Wallace*, 341 F. Supp. 217, 222 n. 2 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972) (administrative convenience constitutes justification for sex-based differential).

Bastardo v. *Warren*, 332 F. Supp. 501, 503 n. 1 (W.D. Wis. 1971) (*Hoyt* classifies by sex for benign purpose).

United States ex rel. Epton v. *Nenna*, 318 F. Supp. 899, 903 (S.D.N.Y. 1970), *aff'd*, 446 F.2d 363 (2d Cir. 1971), *cert. denied*, 404 U.S. 948 (1971) (jury service).

Leighton v. *Goodman*, 311 F. Supp. 1181, 1183 (S.D.N.Y. 1970) (jury service).

United States v. *York*, 281 F. Supp. 8, 13, 16 (D. Conn. 1968) (jury service).

United States v. *Valentine*, 288 F. Supp. 957, 966 (D.P.R. 1968) (nothing in the Constitution prohibits legislative limitation of jury service to males).

United States v. *American Oil Co.*, 249 F. Supp. 130, 136 (D.N.J. 1965) (jury service).

Williams v. *South Carolina*, 237 F. Supp. 360, 371 (E.D.S.C. 1965), *vacated*, 356 F.2d 432 (4th Cir. 1966) (jury service).

United States v. *Greenberg*, 200 F. Supp. 382, 392 (S.D.N.Y. 1961) (a fortiori, a jury selection system less restrictive than the one upheld in *Hoyt* is constitutionally permissible).

Bryson v. *State*, 211 So. 2d 246, 247 (Fla. 1968) (jury service).

Shevin v. *Kahn*, 273 So. 2d 72, 73 n.3 (Fla. 1973), *prob. juris. noted*, 42 U.S.L.W. 3246 (U.S. Oct. 23, 1973) (precedent supports sex-based classification).

Brewer v. *State*, 253 Ind. 154, 159, 252 N.E. 2d 429, 432 (1969) (although Indiana has not chosen to do so, state may constitutionally confine jury duty to males).

Holiday Inns of America v. *The Industrial Commission*, 48 Ill. 2d 529, 531, 271 N.E. 2d 884, 886 (1971) (presumptive validity of sex-based classifications).

Deems v. *Western Maryland Ry.*, 247 Md. 95, 103 n.2, 231 A.2d 514, 518 (1967) (precedent supports sex-based classification).

Commonwealth v. *McKay*, —— Mass. ——, ——, 294 N.E. 2d 213, 216 n.3 (1973) (jury service).

State v. *Hall*, 187 So. 2d 861, 867 (Miss.), *appeal dismissed*, 385 U.S. 98 (1966) (total exclusion of women from jury service is reasonable).

State v. *Parker*, 462 S.W. 2d 737, 739 (Mo. 1971); *State* v. *Davis*, 462 S.W. 2d 798, 800 (Mo. 1971); *State* v. *Wright*, 476 S.W. 2d 581, 586 (Mo. 1972) (*Hoyt* settles the issue—states may grant women absolute exemption from jury service).

State v. *Thomson*, 109 N.H. 205, 208, 247 A.2d 179, 181, *cert. denied*, 394 U.S. 903 (1968) (women need not bear civic responsibilities).

Shpritzer v. *Lang*, 32 Misc. 2d 693, 696, 224 N.Y.S. 2d 105, 109 (Sup. Ct. N.Y. Co.), *modified*, 17 A.D. 2d 285, 234 N.Y.S. 2d 285 (1962), *aff'd*, 13 N.Y. 2d 744, 241 N.Y.S.2d 869 (1963) (plain testimony of the senses, a well-known French proverb and precedent culminating in *Hoyt* support sex-based classification).

DeKosenko v. *Brandt*, 63 Misc. 2d 895, 897, 313 N.Y.S. 2d 827, 830 (Sup. Ct. N.Y. Co. 1970) (*Hoyt* is solidly based; women are to blame for their failure to serve).

Commonwealth v. *Daniels*, 210 Pa. Super. 156, 163, 232 A. 2d 247, 251 (1967), *rev'd*, 430 Pa. 642, 243 A.2d 400 (1968) (*Hoyt* counsels restrained review of sex-based classifications).

Archer v. *Mayes*, 213 Va. 633, 636, 194 S.E. 2d 707, 709 (1973) (*Hoyt* is controlling precedent—only one Supreme Court Justice has suggested *Hoyt* should no longer be followed).

Attorneys for appellees gratefully acknowledge the assistance provided in the preparation of this Appendix by Frank L. Politano, third year student at Columbia Law School.